

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Junk Fax Prevention act of 2005	)	CG Docket No. 05-338
	)	
Rules and Regulations Implementing the Telephone	)	CG Docket No. 02-278
Consumer Protection Act of 1991	)	
_____	)	

**SPRINT NEXTEL COMMENTS**

Sprint Nextel Corporation (“Sprint Nextel”) submits these comments in response to the rulemaking proceeding the Commission has commenced to implement the Junk Fax Prevention Act of 2005 (“JFPA”).<sup>1</sup> Sprint Nextel understands the consumer concern with unsolicited fax messages, and it does not use this medium in the marketing and sale of its services. However, states such as California have begun to enact their own laws with the express intent of nullifying the changes Congress made in the JFPA. A critical step the Commission should take in implementing the JFPA is to confirm that States possess no regulatory authority over interstate communications, including interstate fax messages, and that State laws purporting to regulate interstate communications are null and void.

**I. BACKGROUND**

The JFPA amends the Telephone Consumer Protection Act of 1991 (“TCPA”), 47 U.S.C. § 227. Congress enacted the TCPA because it determined that “Federal law is needed” given

---

<sup>1</sup> See FCC News, *Commission Initiates Proceeding to Implement the Junk Fax Prevention Act* (Dec. 9, 2005); *Junk Fax Prevention Act*, CG Docket No. 05-338, *Notice of Proposed Rule-making*, FCC 05-206 (Dec. 9, 2005), *published in* 60 Fed. Reg. 75102 (Dec. 19, 2005)(“JFPA NPRM”).

that “telemarketers can evade [state law] prohibitions through interstate operations.”<sup>2</sup> As the Commission has observed:

[I]t was the clear intent of Congress generally to promote a uniform regulatory scheme under which telemarketers would not be subject to multiple, conflicting regulations.<sup>3</sup>

Although the Commission initially recognized an “established business relationship” (“EBR”) exception for unsolicited faxes,<sup>4</sup> the Commission revised this position in 1993 when it held it would no longer recognize this exception.<sup>5</sup> In response, Congress codified an EBR exemption to the prohibition on sending unsolicited facsimile advertisements in the JFPA. Congress explained:

Because the Commission may choose not to reverse its new rule removing the EBR exception from the ban on sending unsolicited facsimile advertisements, [this bill] specifically creates a statutory exception from the general prohibition on sending unsolicited advertisements if the fax is sent based on an EBR and certain conditions are met. This legislation is designed to permit legitimate businesses to do business with their established customers and other persons with whom they have an established relationship without the burden of collecting prior written permission to send these recipients commercial faxes.<sup>6</sup>

President Bush signed the JFPA into law on July 9, 2005.<sup>7</sup>

Three months later, on October 7, 2005, California Governor Schwarzenegger signed into law SB 833, which purports to regulate interstate transmission of facsimile messages.<sup>8</sup> Specifi-

---

<sup>2</sup> Confessional Statement of Findings, PUB. L. NO. 102-243, § 2(7).

<sup>3</sup> 2003 *TCPA Order*, 18 FCC Rcd 14014, 14064 ¶ 83 (2004).

<sup>4</sup> See JFPA NPRM at ¶ 3.

<sup>5</sup> See *id.* at ¶ 4.

<sup>6</sup> S. Rep. No. 109-76, 109<sup>th</sup> Cong., 1<sup>st</sup> Sess., at 6 (June 7 2005).

<sup>7</sup> See White House Press Release, *President Signs June Fax Prevention Act of 2005* (July 11, 2005).

<sup>8</sup> See Governor Schwarzenegger Press Release, *Legislative Update 10/07/05* (Oct. 7, 2005).

cally, SB 833 makes it a “crime” to send unsolicited faxes to recipients “located in California” -- even where the sender is located in a different state and even where the sender and recipient have an established business relationship. Section 1(b)(1) of SB 833 provides:

It is unlawful for a person or entity, if . . . the recipient is located within California, to use any telephone facsimile machines, computer, or other device, to send an unsolicited advertisement to a telephone facsimile machine.

“According to the author [of SB 833], this bill is critically important because Congress has enacted legislation [*i.e.*, the JFPA] which creates large loopholes in the federal junk fax ban.”<sup>9</sup> In other words, the California Legislature enacted the new law with the deliberate intent of nullifying Congress’ modifications to the JFPA.

On December 20, 2005, a federal district court in California issued “a provisional stay on the enactment of SB 833 pending further review.”<sup>10</sup> This court, however, does not have the authority to address similar laws enacted by other States.

## **II. STATES LACK AUTHORITY TO REGULATE INTERSTATE FAX MESSAGES**

Congress has directed the Commission to “issue regulations to implement” the JFPA.<sup>11</sup> The most important step the Commission must take in implementing this Act is to declare that States such as California lack the authority to regulate interstate fax transmissions and that as a result, they cannot change the requirements for interstate faxes that Congress enacted in the JFPA.

---

<sup>9</sup> SB 833 Bill Analysis, Assembly Floor, at 3 (Sept. 1, 2005).

<sup>10</sup> *See Chamber of Commerce v. Lockyer*, No. 2:05-cv-2257-MCE-KLM, 2005 U.S. Dist. LEXIS 34538 (E.D. Cal., Dec. 20, 2005).

<sup>11</sup> *See* JFPA at § 2(h).

The Commission has been clear in the past that States lack all authority to regulate interstate fax messages. For example, the Common Carrier Bureau wrote in 1998:

The Communications Act, specifically section 227 of the Act, establishes Congress' intent to provide for regulation *exclusively* by the Commission on the use of the interstate telephone network for unsolicited advertisements by facsimile. . . . Maryland can regulate and restrict intrastate commercial telemarketing calls. *The Communications Act, however, precludes Maryland from regulating or restricting interstate commercial telemarketing calls. Therefore, Maryland cannot apply its statutes to calls that are received in Maryland and originate in another state or calls that originate in Maryland and are received in another state.*<sup>12</sup>

However, the Commission appears to undermine this otherwise clear federal preemption in its *2003 TCPA Order*, by announcing that the TCPA is “ambiguous” with respect to state regulation of interstate telecommunications (including facsimile) and “silent on the issue of where state law that imposes more restrictive regulations on interstate telemarketing calls may be preempted.”<sup>13</sup> The Commission suggested that States could regulate interstate fax messages so long as they did not conflict with federal law requirements.<sup>14</sup> Notably, however, the Commission did not explain its statement that the TCPA was “ambiguous,” nor did it explain why its prior view – States have no authority over interstate facsimiles – was no longer accurate.<sup>15</sup> To

---

<sup>12</sup> Letter from Geraldine A. Matisse, Chief Network Services Division, Common Carrier Bureau, to Delegate Ronald A. Guns, Maryland House of Delegates, at 2-3 (Jan. 26, 1998)(emphasis added).

<sup>13</sup> *2003 TCPA Order*, 18 FCC Rcd 14063-64 ¶ 82.

<sup>14</sup> See *id.* at 14064 ¶ 84 (“We therefore believe that any state regulation of interstate telemarketing calls that differs from our rules almost certainly would conflict with and frustrate the federal scheme and almost certainly would be preempted.”).

<sup>15</sup> See, e.g., *IRS v. Federal Labor Relations Authority*, 963 F.2d 429, 434 (D.C. Cir. 1992) (“It is well established that where an agency departs from its prior cases, it must do so pursuant to reasoned decisionmaking.”); *Gilbert v. NLRB*, 56 F.3d 1438, 1445 (D.C. Cir. 1995) (“It is, of course, elementary that an agency must conform to its prior decisions or explain the reason for its departure from such precedent.”); *Hall v. McLaughlin*, 864 F.2d 868, 872 (D.C. Cir. 1989) (“Divergency from agency precedent demands an explanation.”); *Greater Boston Telephone v. FCC*, 444 F.2d 841,852 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971) (“An agency chang-

the contrary, the Commission reached its new ambiguity conclusion despite recognizing that Congress enacted the TCPA “based upon the concern that states lack jurisdiction over interstate calls” and that “states traditionally have had jurisdiction over only intrastate calls.”<sup>16</sup>

The Commission’s suggestion in 2003 that the TCPA is “ambiguous” regarding State authority over interstate telecommunications is not consistent with either the language or the structure of the Act:

- Congress enacted the TCPA because States lacked authority to regulate interstate telemarketing.<sup>17</sup>
- In the TCPA, Congress expanded FCC authority to include intrastate telemarketing, and it further empowered the FCC to “design different rules,” a task requiring a “balancing” of competing interests.<sup>18</sup> Obviously, the FCC cannot discharge this statutory function if States can “trump” FCC decisions by applying more restrictive rules to interstate telemarketing.
- Congress expressly preserved State authority to adopt more restrictive rules with respect to intrastate telemarketing.<sup>19</sup> This savings clause would have

---

ing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if any agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute.”); *Ramaprasad v. FAA*, 346 F.3d 1121, 1130 (D.C. Cir. 2003)(“Where an agency departs from established precedent without a reasoned explanation, its decision will be vacated as arbitrary and capricious.”); *Pontchartrain Broadcasting v. FCC*, 15 F.3d 183, 185 (D.C. Cir. 1994)(“[A]n unexplained departure from Commission precedent would have to be overturned as arbitrary and capricious.”); *Northpoint v. FCC*, 312 F.3d 145, 156 (D.C. Cir. 2005)(“[A]n unexplained departure from prior Commission policy and practice is not a reasonable one . . . [and] is unauthorized.”).

<sup>16</sup> 2003 TCPA Order, 18 FCC Rcd at 14064 ¶ 83.

<sup>17</sup> See, e.g., Congressional Statement of Findings, PUB. L. NO. 102-243, § 2(7)(“Over half the States now have statutes restricting various uses of the telephone for marketing, but telemarketers can evade their prohibitions through interstate operations; therefore, Federal law is needed to control residential telemarketing practices.”).

<sup>18</sup> See Congressional Statement of Findings at §§ 2(9) and (13). See also *id.* at § 2(15)(FCC empowered to adopt rules pertaining to calls to businesses).

<sup>19</sup> See 47 U.S.C. § 227(e)(1)(“[N]othing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements.”).

been unnecessary had Congress also given States the authority to adopt more restrictive rules as applied to interstate telemarketing.

- Congress empowered States to enforce FCC rules as applied to interstate telemarketing.<sup>20</sup> This enforcement authority would have been unnecessary if States could apply their own telemarketing laws to interstate telemarketing.
- Congress gave consumers a private right of action to sue in State court interstate telemarketers who violate FCC rules.<sup>21</sup> Again, this special remedy would have been unnecessary if States could apply their own telemarketing laws to interstate telemarketing.

Congress' intent to preempt State regulation of interstate telemarketing and facsimile is further buttressed by all legislative history, including:

- The Senate Report accompanying the TCPA stated that "Federal action is necessary because States do not have jurisdiction to protect their citizens against those who . . . place interstate telephone calls."<sup>22</sup>
- The House Report accompanying the TCPA stated that "federal legislation is needed to . . . protect legitimate telemarketers from having to meet multiple legal standards."<sup>23</sup>
- One of the co-sponsors of the bill in the Senate and the Chairman of the Senate Commerce Committee stated that "State law does not, and cannot, regulate interstate calls,"<sup>24</sup> and that "[p]ursuant to the general preemptive effect of the Communications Act of 1934, State regulation of interstate communications, including interstate communications initiated for telemarketing purposes, is preempted."<sup>25</sup>
- One of the co-sponsors of the bill in the House, and a ranking member of the House Telecommunications Subcommittee, stated that to "ensure a uniform approach to this nationwide problem H.R. 1304 would preempt inconsistent State law. From the industry's perspective, preemption has the important benefit of ensuring that telemarketers are not subject to two layers of regulation."<sup>26</sup>

---

<sup>20</sup> See *id.* at § 227(f)(1).

<sup>21</sup> See *id.* at § 226(c)(5).

<sup>22</sup> S. REP. NO. 102-178, at 5 (1991).

<sup>23</sup> H.R. REP. NO. 202-317, at 10 (1991).

<sup>24</sup> 137 Cong. Rec. S18781, 18784 (daily ed. Nov. 7, 1991)( remarks of Sen. Hollings).

<sup>25</sup> 137 Cong. Rec. S16205 (daily ed. Nov. 27, 1991)(remarks of Sen. Hollings).

<sup>26</sup> 137 Cong. Rec. H10339, 10342 (Nov. 18, 1991)(remarks of Rep. Rinaldo).

- Another co-sponsor of the bill in the House stated that the legislation, which “covers both intrastate and interstate unsolicited calls, will establish Federal guidelines that will fill the regulatory gap due to difference in Federal and State telemarketing regulations. This will give advertisers a single set of ground rules and prevent them from falling through the cracks between Federal and State statutes.”<sup>27</sup>

There is, in summary, no basis to the view that the TCPA is ambiguous regarding State authority over interstate communications.

### III. CONCLUSION

The JFPA cannot be implemented if States enact laws that seek to override the provisions of the JFPA as applied to interstate facsimile messages. The Commission in its implementing order should therefore declare that State attempts to override the JFPA are null and void insofar as they purport to regulate interstate facsimile messages.

Respectfully submitted,

**SPRINT NEXTEL CORPORATION**

/s/ Luisa L. Lancetti

Luisa L. Lancetti

Vice President

Government Affairs – Wireless Regulatory

Charles W. McKee

Director

Government Affairs – Wireless Regulatory

Sprint Nextel Corporation

401 9th Street, N.W., Suite 400

Washington, D.C. 20004

202-585-1923

Its Attorneys

January 18, 2006

---

<sup>27</sup> 137 Cong. Rec. H793 (daily ed. March 6, 1991)(remarks of Rep. Markey).